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No. 80-2195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, *Petitioner*

v.

LEARLEY REED GOODWIN

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the respondent's prosecution for felony charges based on the same conduct underlying the original lesser charges was a denial of due process of law where the more serious charges were substituted only after he had exercised his right to a jury trial on the original charges and in the absence of any intervening justification?

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Following his trial by jury in the United States District Court for the District of Maryland, the respondent was convicted of forcibly assaulting a federal officer, in violation of 18 U.S.C. § 111, and of fleeing or eluding a police officer, in violation of 18 U.S.C. §§ 7 and 13, and Md. Trans. Code Ann. § 21-904 (1977). He was sentenced to consecutive terms of imprisonment of five years and one year, respectively. On appeal to the United States Court of Appeals for the Fourth Circuit, the respondent's conviction for forcible assault of a federal officer was reversed on the grounds that he was denied due process of law by the institution of the felony charge only after he had exercised his right to a jury trial on the petty offense and misdemeanor charges initially brought against him for the same underlying conduct. The pertinent facts are set forth in the

appellate court's opinion (Pet. App. 2a-4a), and briefly stated, they are as follows:

1. On February 2, 1976, at approximately 7:00 p.m., the respondent was stopped for speeding on the Baltimore-Washington Parkway by United States Park Police Officer James Morrissette. (C.A. App. 91-108).[1] After stopping, the respondent emerged from his vehicle and provided Officer Morrissette with license and registration information. While speaking with the respondent, the officer directed his flashlight into the vehicle and observed a clear plastic bag underneath the armrest next to the driver's seat. Pursuant to the officer's request, the respondent reentered his vehicle and lifted the armrest. As he did so with his right hand, he grabbed the clear plastic bag with his left and threw the bag onto the floor area. The vehicle was then placed into gear and rapidly accelerated. As the car started forward, it "fishtailed," striking Officer Morrissette. (*id.* at 100-01). The officer returned to his car and pursued the respondent at a high rate of speed, but was unable to apprehend him. (*id.* at 101-03).

The next day, Officer Morrissette filed a complaint in the United States District Court for the District of Maryland, at Hyattsville, (a magistrate level tribunal), charging the respondent with the following misdemeanors and petty offenses: (1) unlawfully failing to give aid, information and identification at the scene of a personal injury accident, in violation of 18 U.S.C. §§ 7 and 13, and Md. Trans. Code Ann. §§ 20-102, 20-104; (2) assault by striking, beating or wounding, in violation of 18 U.S.C. § 113(d); (3) fleeing or eluding a police officer, in violation of 18 U.S.C. §§ 7 and 13, and Md. Trans. Code Ann. § 21-904; (4) reckless driving, in violation of Title 36, Code of Federal Regulations, § 50.32; (5) exceeding the posted speed limit, in violation of 36 C.F.R. § 50.31 (2

[1] "C.A. App." refers to the joint appendix in the court of appeals.

counts).[2] (Pet. App. 2a; J.A.10). The respondent was arrested on March 11, 1976, and subsequently appeared before the United States Magistrate at Hyattsville on March 30, 1976, for a preliminary hearing on the misdemeanor charge of fleeing or eluding.[3] The court found probable cause, and scheduled trial on the aforementioned charges for April 29, 1976. (Pet. App. 2a-3a). After being released on his own recognizance, the respondent failed to appear for trial. (*ibid*).

In March, 1979, the court was informed that the respondent had been located in a correctional facility in Arlington, Virginia, where he was awaiting sentencing on state charges. Due to the logistical problems involved in returning the respondent to the District of Maryland for trial, the United States Attorney's office in Baltimore was contacted. After communication between Assistant United States Attorney Edward M. Norton and state authorities in Virginia and California, an agreement was reached whereby the respondent would be released to the custody of the United States Marshal for the District of Maryland, to be returned to California state authorities upon completion of the federal proceedings. During his contact with the Virginia state authorities, prosecutor Norton was advised that the respondent was awaiting sentencing for his convictions of attempting to shoot a police officer and possession of heroin. (Pet. App. 25a-27a).

On May 24, 1979, the respondent was returned to the Hyattsville court for trial on the aforementioned complaint, as well as on the further charge of failure to appear, in violation of 18 U.S.C. § 3150. The respondent's case was assigned to Ms.

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[2] The maximum potential penalty for these various charges, assuming conviction and consecutive sentences for each, is four years and two months.

[3] The respondent was not entitled to such a hearing on the remaining charges which were petty offenses. Rule 5, Federal Rules of Criminal Procedure.

Blanche Bruce, a trial attorney from the anti-trust division of the Department of Justice in Washington who was on a special detail to Hyattsville to prosecute petty offenses and misdemeanor cases before the magistrate. (J.A. 25-26). During the course of her trial preparation, Ms. Bruce read the incident report filed by Officer Morrissette and discussed the offenses with him. Pursuant to her review of the report and conversations with the officer, she was aware of the underlying facts of the incident. *(ibid)*.

Prior to the respondent's appearance before the magistrate, Ms. Bruce was approached by defense counsel for the respondent who inquired whether the prosecution would consider a plea. Although Ms. Bruce expressed some interest in the proposal, the respondent thereafter informed his attorney that he did not wish to plead guilty and desired a jury trial. During these discussions, there was no consideration given or reference made to possible additional or more serious charges being brought against the respondent. (*ibid*).

As a result of the respondent's plea of not guilty and his request for a jury trial, the case was transferred to the United States District Court for the District of Maryland, at Baltimore.[4] The prosecution of the respondent's case was assigned to prosecutor Norton, who conducted pre-trial preparation of the case. (Pet. App. 25a-31a). Subsequently, the prosecutor sought and obtained a four-count indictment charging the defendant with fleeing or eluding a police officer and failure to appear, as previously charged, as well as the additional felony charges of assault upon a federal officer, in violation of 18 U.S.C. § 111, and assault with a dangerous weapon, in violation of 18 U.S.C. § 113(c). (J.A. 12-14).

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[4] In May, 1979, there was no provision allowing a trial by jury before a magistrate. Therefore, a request for a jury trial divested the magistrate of jurisdiction to hear the case. However, 18 U.S.C. § 3401(b), as amended on October 10, 1979, now provides for a trial by jury before a magistrate.

On September 12, 1979, a jury found the respondent guilty of felonious assault upon a federal officer and of the misdemeanor charge of fleeing or eluding a police officer. He was acquitted on the charge of assault with a dangerous weapon, and the failure to appear charge, which had been severed for purposes of trial, was later dismissed. (J.A. 6,8).

Subsequent to the verdict, the respondent moved for the dismissal of the felonious assault charge on the grounds that the filing of this charge violated his Fifth Amendment right to due process of law. (J.A. 15-21). The respondent did not rely upon actual vindictiveness on the part of the government, (*id.* at 18), but contended that the appearance of vindictiveness which existed as a result of the increased charges deprived him of due process of law. (*id.* at 21). In response to that motion, prosecutor Norton submitted an affidavit explaining his decision to seek the felony charges. (Pet. App. 25a-31a). In summary, the prosecutor stated that: (1) the defendant's conduct on February 2, 1976, was considered to be a serious violation of law; (2) the defendant had a lengthy history of violent crime; (3) the defendant's conduct on February 2, 1976, was considered to be related to major narcotics trafficking; (4) the defendant was believed to have committed perjury when he testified at his preliminary hearing; and (5) the defendant had failed to appear for trial on April 29, 1976. Although the trial court granted relief from the waiver provisions of Rule 12(b) of the Federal Rules of Criminal Procedure, the respondent's motion was denied.[5] (Pet. App. 18a-23a).

A divided panel of the court of appeals reversed the respondent's felony conviction. (Pet. App. 1a-15a). The court disclaimed any reliance upon the notion that actual vindictiveness

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[5] The district court rendered its decision on this issue based on a statement of stipulated facts, affidavits, motion papers, and oral argument. (J.A. 24-25).

motivated the seeking of the felony indictment. (*id.* at 4a). However, while finding no actual vindictiveness, the majority concluded that the circumstances surrounding the return of the felony charge subsequent to the respondent's invocation of his right to a jury trial gave rise to a genuine risk of retaliation. (*id.* at 6a). The court stated:

> Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.

(*id.*) Judge Widener dissented, arguing that the prosecutor's actions in this case were sanctioned by this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). (Pet. App. 14a-15a).

A petition for rehearing *en banc* filed by the government was denied on April 16, 1981.

SUMMARY OF ARGUMENT

1. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court established a due process limitation on the imposition of sentence upon reconviction, concluding that an accused who has successfully attacked his conviction on appeal may not be subjected to a more severe sentence upon retrial and conviction, absent identifiable conduct occurring after the original sentencing proceeding. This prophylactic rule was adopted and applied to the issue of prosecutorial vindictiveness in *Blackledge* v. *Perry*, 417 U.S. 21 (1974). These cases implemented essential due process protections against retaliatory conduct by the government for the assertion of procedural rights, as well as the apprehension of such vindictiveness, by fashioning a special prophylactic measure whose application is warranted where there exists a realistic likelihood of vindictiveness.

In the instant case, there existed a realistic likelihood of vindictiveness since the prosecutor possessed a considerable interest in deterring the exercise of the right to a district court jury trial. Given the enormous difference in expenditure of prosecutorial resources between a court trial before the magistrate and a district court jury trial, there was ample incentive on the part of the prosecutor to deter the exercise of this right. Moreover, since the increased charges levied against the respondent subsequent to his exercise of his right to a jury trial were based on the identical conduct underlying the original charges, the prosecutorial interest in the unfettered exercise of its discretion is diminished. Indeed, having once exercised its charging authority to prosecute the respondent for his criminal conduct, the substituted charges are more likely the result of a vindictive motive.

Pursuant to this Court's teachings in *Pearce* and *Perry*, this realistic likelihood of vindictiveness presented in the case under review warrants application of the prophylactic rule established in those cases. Such a rule is appropriately applied in a pre-trial setting once having established that a genuine hazard of vindictiveness inheres in the particular context. Such application neither unduly burdens or interferes with the proper exercise of prosecutorial discretion since the prosecution remains free to bring increased charges if justified by numerous circumstances including the receipt of new information during pre-trial investigation concerning the accused or other circumstances that rendered prosecution on the more serious charges impossible at the outset of the case. While this due process standard necessarily constrains prosecutorial discretion to a limited extent, such restraint is constitutionally mandated and does not infringe upon prosecutorial discretion where that discretion is properly and competently exercised. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), also does not preclude application of the *Pearce/Perry* prophylactic to the pre-trial stage of a criminal proceeding. *Bordenkircher* was based upon this Court's express deter-

mination that plea bargaining is a necessary component to the administration of the criminal justice system, and that any element of punishment or retaliation is absent from that process so long as the accused is free to accept or reject the prosecution's offer. Given the absence of the "give-and-take" of plea bargaining in this case, *Bordenkircher* does not control.

2. The due process rationale of *Pearce* and *Perry* require that increased charges following a defendant's exercise of a procedural right must be justified by a narrowly defined showing of objective, non-retaliatory factors. While such a rule necessarily limits prosecutorial discretion to some degree, the restraint is narrowly confined to do no more than is required by due process, that is, to assure an absence of vindictiveness or an appearance thereof.

In the instant case, the prosecutor failed to sustain this burden of rebuttal. At the time of the respondent's exercise of his right to a jury trial, the prosecution was aware of the information which is offered in support of the increased charges. However, the prosecution was then content to proceed before the magistrate on the petty offense and misdemeanor charges. The prosecution had ample opportunity to reassess the propriety of these charges, and could easily have declined to proceed pending further review. Nevertheless, the prosecution against the respondent on the lesser charges would have proceeded but for his election of a jury trial. Under these circumstances, the opportunities for vindictiveness are such as to require the application of the *Pearce/Perry* rule.

I. THE OPPORTUNITIES FOR VINDICTIVENESS PRESENTED BY THE FACTS OF THIS CASE — WHERE THE PROSECUTION INITIATED MORE SERIOUS CHARGES ONLY AFTER THE RESPONDENT HAD EXERCISED HIS RIGHT TO A DISTRICT COURT JURY TRIAL AND IN THE ABSENCE OF INTERVENING JUSTIFICATION — ARE SUCH THAT DUE PROCESS OF LAW REQUIRES THE APPLICATION OF THE PROPHYLACTIC MEASURE ESTABLISHED IN *NORTH CAROLINA* V. *PEARCE* AND *BLACKLEDGE* V. *PERRY*.

In reliance upon this Court's teachings in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the court of appeals concluded that the respondent's due process rights were violated by the felony prosecution which was not instituted until subsequent to his election to be tried by a jury on lesser charges based on the same conduct, even though the facts which motivated the filing of the increased charges were available to the government before the exercise of the right to a jury trial. The petitioner contends that such reliance was misplaced, asserting that either these authorities do not apply to the instant case or that their requirements are satisfied. The petitioner's argument is based on an unduly restrictive interpretation of these cases and on an unwarranted application of that case law to the peculiar facts of this case.

A. The Policies Underlying The Prophylactic Rule Developed In *Pearce* And Adopted In *Perry* Are Implicated Whenever A Realistic Likelihood of Vindictiveness Inheres In A Given Situation.

In *North Carolina* v. *Pearce*, *supra*, this Court considered the constitutional implications of the imposition of enhanced sentences upon defendants who had successfully challenged their original conviction. Although expressly rejecting the contention that either the protection against double jeopardy or the Equal Protection Clause precluded harsher sentences upon reconviction, this Court recognized due process constraints on this exercise of judicial discretion. This Court concluded that an

accused who has successfully attacked his conviction on appeal may not be subjected to a more severe sentence upon retrial and conviction, absent identifiable conduct on the part of the defendant occurring after the original sentencing proceeding which justify such a sentence. *id.* at 726.

This holding was grounded, in part, upon the principle of law that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *id.* at 725. However, while cognizant of the obvious impropriety of such an express punitive policy, this Court also emphasized the need to obviate the deterrent effect produced by the apprehension of such vindictiveness:

> And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

ibid. Finding that a genuine risk of vindictiveness inhered in this resentencing process, *id.* at 725, n.20, this Court fashioned the prophylactic measure designed to prevent not only actual vindictiveness, but "the wrong [that] would extend . . . to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation." *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 25 (1973).

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court declined to apply the *Pearce* due process rationale to a two-tiered system of criminal adjudication whereby a defendant may seek a trial *de novo* after conviction of a misdemeanor in an inferior court, but risks greater punishment if again convicted. Reiterating its justification for the prophylactic rule restricting imposition of increased sentences upon reconviction, this Court concluded that a similar possibility of vindictiveness was not

inherent in Kentucky's two-tiered system, and distinguished *Pearce* primarily by the fact that:

> [t]he court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly.
>
> * * *
>
> In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have "enhanced" the sentence.

id. at 116-117, 118. This Court also discounted any systemic concerns that would improperly motivate the second sentencing court, finding no reason "to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after a conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court . . ." *id.* at 117. Since the likelihood that vindictiveness would motivate increased sentences after a trial *de novo* was minimal, this Court found that the application of the *Pearce* prophylactic rule was inappropriate.

In *Chaffin* v. *Stynchcombe*, *supra*, this Court adopted a similar analysis in determining the applicability of *Pearce* to a two-tiered trial system in which the jury, rather than a judge, imposed sentence in the second stage. In its analysis of *Chaffin* in *Blackledge* v. *Perry*, this Court emphasized:

> [t]hat the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review.

Blackledge v. *Perry*, *supra*, 417 U.S. at 27. Thus finding "no basis for holding that jury resentencing poses any real threat of

vindictiveness," *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 28, this Court rejected *Pearce's* due process concept in this setting.

In *Blackledge* v. *Perry*, *supra*, this Court considered the merits of extending the rationale of *Pearce* to the exercise of prosecutorial discretion. In *Perry*, the accused invoked his statutory right to a trial *de novo* following his misdemeanor conviction in the lower court. The prosecutor immediately thereafter obtained a felony indictment which was founded on the identical conduct underlying the original misdemeanor charge. *id.* at 23. This Court eschewed any reliance whatsoever on the notion that the prosecutor had, in fact, acted vindictively but stated that "[t]he rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist." *id.* at 28. Stressing that due process is equally offended by the deterrent effect occasioned by the apprehension of such a retaliatory motivation, this Court declared *Pearce* apposite, stating:

> [A] person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

id.

Upon review of its earlier holdings, this Court in *Perry* recognized that the due process violation decried in *Pearce* arose not from the deterrent effect that the possibility of increased punishment may have upon the assertion of appellate rights, but from the deterrent effect of increased punishment that poses "a realistic likelihood of 'vindictiveness'." *id.* at 27. As stated by the court of appeals below, "the Supreme Court suggests only that a deterrent arising solely from the risk of higher punishment may be permissible while a deterrent arising from the risk of vindictiveness is not." Pet. App. 8a. Having

identified this essential criterion whose application warranted the adoption of the prophylaxis in *Pearce* but not in *Colten* or *Chaffin*, the *Perry* Court inquired "whether opportunities for vindictiveness in this situation are such as to impel the conclusion that the due process of law requires a rule analogous to that of the *Pearce* case." *id.* at 27.

In *Pearce*, this Court had found such "opportunities for vindictiveness" in the unexplained increase in punishment upon reconviction in the cases before it. Although left unsaid in this Court's opinion, later cases recognized that the hazard of retaliation derived substance from the apparent motive and ability of the sentencing tribunal to penalize the defendant for having successfully challenged his conviction. *See Colten* v. *Kentucky, supra*, 407 U.S. at 116-17; *Chaffin* v. *Stynchcombe, supra*, 412 U.S. at 26-28. Similarly, in *Perry*, this Court found that the requisite likelihood of vindictiveness inhered in the situation where a prosecutor, whose interest, or "stake," in the conservation of scarce prosecutorial resources and in the finality of a conviction is considerable, "has the means readily at hand to discourage such appeals — by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy. . . ." *id.* at 27-28. Grounded upon this prosecutorial motive and capacity for retaliation, this Court found a sufficient potential for vindictiveness in this context such that application of the *Pearce* due process rationale was necessary.

Thus, in a context presenting a realistic likelihood of prosecutorial vindictiveness, *Blackledge* v. *Perry* fully adopted a due process standard established in *Pearce* which assures the absence of actual retaliation, as well as a freedom from the apprehension of such a motivation. Given the inherent difficulties in assessing actual motivation on the part of a judge or prosecutor, *see North Carolina* v. *Pearce, supra*, 395 U.S. at 725, n.20, this Court has determined that application of a

prophylactic rule is the only effective means of implementing these requirements of due process. Accordingly, in a situation where a genuine hazard of retaliation exists, even an apprehension of vindictiveness must be adequately dispelled.

An interpretation of *Pearce* and *Perry* that conditions their applicability upon a finding of actual vindictiveness misconstrues this Court's approach.[6] It is the risk, as well as the actuality, of vindictiveness that evokes the due process considerations underlying the holding in these cases. Indeed, *Perry* expressly repudiated the notion "that actual retaliatory motivation must inevitably exist." 417 U.S. at 28. Therefore, the existence *vel non* of actual vindictiveness is not the touchtone of this Court's analysis; rather, the essential question is whether there is a genuine hazard of retaliation in the situation under review.[7]

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[6] *Moon* v. *Maryland*, 398 U.S. 319 (1970) does not hold to the contrary. *Moon* simply stands for the proposition that no issue as to the retroactive application of the constitutional standards of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), arises where there is no claim of vindictiveness on the part of the sentencing judge. *United States* v. *Gambert*, 433 F.2d 321, 323 n.5 (4th Cir. 1970).

[7] The remote or mere possibility of retaliation for the exercise of constitutional or statutory rights does not trigger application of the *Pearce/Perry* protective measure. For example, in *Koski* v. *Samaha*, 648 F.2d 790 (1st Cir. 1981), the defendant sought application of the *Pearce* rule to a prosecutor's increased sentencing recommendation in a *de novo* proceeding. Stating that sentencing is the province of the court and that, in any event, there are ample non-vindictive reasons for a particular sentencing recommendation, the court concluded "that for the prosecutor to recommend a higher sentence at the trial *de novo* does not necessarily reflect an attempt to penalize the defendant for utilizing the appellate process." *id.* at 797. Therefore, finding no real hazard of vindictiveness in this context, the court ruled that *Pearce* was inapplicable. *See also Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27, n.13 (1973). *United States*, v. *Thurnhuber*, 572 F.2d 1307 (9th Cir. 1977), further illustrates this notion. There, the appellant contended that the bringing of two additional charges subsequent to his first trial which ended in the court's *sua sponte* declaration of a mistrial was improper as the product of prosecutorial vindictiveness. Although acknowledging that a defendant's

B. A Realistic Likelihood Of Vindictiveness Exists Where The Prosecutor, Whose Stake In Deterring The Exercise Of A Defendant's Right To A District Court Jury Trial Is Considerable, Substitutes More Serious Charges Only After That Right Was Invoked.

In the wake of this Court's decisions in this area of law, it is evident that *Pearce/Perry* considerations apply only when the "penalty," be it a higher sentence or the institution of more serious charges, presents a realistic likelihood of vindictiveness. Therefore, the threshold inquiry in this case is whether the particular factual situation presents a "realistic likelihood of vindictiveness" for the prosecutor's augmentation of the charges. *See United States* v. *Andrews, supra,* 633 F.2d at 453. The court of appeals properly focused on this question, stating that

> [u]nder *Blackledge,* we need not determine whether retaliation actually occurred in this case. It is enough that the circumstances surrounding the felony indictment give rise to a genuine risk of retaliation.

Pet. App. 6a. The majority concluded:

> Unlike the defendants in *Colten [v. Kentucky]* and *Chaffin [v. Stynchcombe],* but like the defendant in *Blackledge,* Goodwin faced increased charges brought by a prosecutor who had an incentive to deter misdemeanor defendants from exercising a right that would "require increased expenditures of" his own time. *Blackledge, supra,* 417 U.S.

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motion for a mistrial has been considered an exercise of a procedural right within the contemplation of the *Pearce* rule, no assertion of this, or any other, procedural right occurred in this case. Absent any exercise of a procedural right by the defendant, the prosecutor's action was manifestly not made in retaliation thereto. The court therefore concluded that the situation under review, absent some link between the exercise of the right and the "penalty," did not present a realistic likelihood of vindictiveness. *id.* at 1310. *Cf. United States* v. *Ricard,* 563 F.2d 45 (2d Cir. 1977) (*Pearce/Perry* claim rejected since there was nothing to warrant the conclusion that the defendant's decision to go to trial rather than plead guilty triggered the superseding indictment.)

> at 27, 94 S.Ct. at 2102. Thus, for defendant, and those similarly situated, "the danger that the [government] might be retaliating" is real. *Bordenkircher [v. Hayes], supra,* 434 U.S. at 363, 98 S.Ct. at 687.

Pet. App. 8a. Reasoned analysis supports the Fourth Circuit's holding.

1. The prosecutor clearly has a considerable stake in discouraging the defendant from obtaining a district court jury trial since such a trial involves the increased expenditures of prosecutorial resources.

This Court's prior holdings in this area offer a useful analytical framework for assessing the potential for vindictiveness in a given situation. In *Pearce, Colten, Chaffin,* and *Perry,* assertion of a procedural or statutory right resulted in more serious action being taken against the defendant, be it harsher resentencing after appeal or, as in *Perry,* the filing of more serious charges by the prosecutor. However, the crucial and, indeed, controlling, consideration is the incentive of the court or prosecutor taking the second and more severe action to discourage and/or penalize the defendant's exercise of his rights, and the ability to satisfy that motive.

Accordingly, in *Perry,* this Court concluded that a realistic likelihood of vindictiveness existed where the prosecutor had a "considerable stake" in deterring convicted misdemeanants from exercising their right to a trial *de novo,* as well as the means to "up the ante." This finding warranted the application of the *Pearce* due process rule. In contrast, this Court rejected the argument that the *de novo* court in *Colten* or the jury in *Chaffin,* each being the authority taking the second and more serious action, possessed the requisite retaliatory incentive. Finding neither to have a personal stake in discouraging the defendant's exercise of his rights nor a sensitivity to the institutional interests affected by the defendant's action, and emphasizing the likelihood that the second action was taken in ignor-

ance of the original action, this Court concluded that the potential for vindictiveness in these contexts was insufficient to invoke the *Pearce* due process rationale. See argument *supra* at 10-12.

As held by the court of appeals, see *supra* at 15-16, the instant case closely tracks the circumstances in *Perry* which supported the finding of a realistic likelihood of vindictiveness.[8] While an interest in maintaining the finality of a conviction is not implicated in the present case, there nevertheless exists a substantial prosecutorial incentive to discourage defendants charged in magistrate's court from exercising their right to a jury trial before a district court judge. First, a prosecutor handling the district court case will undoubtedly be aware of the original action that had been taken against the defendant, thus immediately distinguishing this situation from that presented in either *Colten* or *Chaffin*. Second, the prosecutor has a personal stake to the extent that his time and effort would not be required if the case remained at the magistrate level, a situation analogous to that presented in *Perry* if no trial *de novo* had been requested. Third, the request for a jury trial at the district court level will require the expenditure of prosecutorial resources greatly in excess of that required by a court trial before the magistrate. There are definite costs that attend a jury trial in terms of both time and money that simply are not incurred if the

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[8] Indeed, while generally described as involving the defendant's statutory right to appeal, the circumstances in *Perry* actually pertain to, as does the present case, the defendant's Sixth Amendment right to a jury trial. In the North Carolina two-tiered system, applicable in *Perry*, a jury trial was not available until the trial *de novo* in superior court. The defendant's exercise of his statutory right to a trial *de novo* was, in effect, an exercise of his right to a jury trial. Therefore, the prosecutorial interest in discouraging the assertion of such a right in *Perry* — one which this Court found to be "considerable" — is implicated in the case under review.

case proceeds before a magistrate for a court trial.[9] These costs represent definite institutional interests to which the prosecutor is highly sensitive.

Thus, it is clear that a defendant accused of misdemeanor and petty offenses is confronted by an adversary with a "considerable stake" in deterring the exercise of his right to a trial by jury. As in *Perry*, the prosecutor possesses the motive and the means to "insure that only the most hardy defendants will brave the hazards" . . . , 417 U.S. at 28, of exercising their right to a district court jury trial.

2. Where more serious charges based on the same conduct underlying the original charges are brought, the realistic likelihood of vindictiveness is heightened.

A claim of vindictiveness arising from the institution of more serious charges represents a direct challenge to the exercise of prosecutorial discretion. Thus, in assessing the risk of vindictiveness posed by such action, a determination of the nature and proper scope of prosecutorial discretion in this context is necessary.

It is well settled that prosecutors must be accorded great latitude in the discharge of their charging authority:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and

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[9] In *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), this Court stated that "if every criminal charged were subjected to a full-scale trial, the State and Federal Government would need to multiply by many times the number of judges and court facilities." Although referring to the savings of resources as a result of plea bargaining, this observation is equally apt here where the enormous practical difference between a full-blown district court jury trial and a magistrate's court trial is highly significant.

> what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Bordenkircher v. *Hayes, supra,* 434 U.S. at 364 (footnote omitted). The scope of the proper exercise of prosecutorial discretion includes the unfettered freedom to determine at the outset of a criminal case which statute will be invoked to charge a particular criminal act. However, once this determination has been made and a prosecution instituted, the prosecution's interest in its unfettered discretion has been satisfied.

Thus, the substitution of a more serious charge based on identical criminal conduct underlying the original charge simply does not implicate the prosecution's strong interest in preserving its legitimate discretion to initiate charges for that conduct. Instead, substitution presents the very real possibility that the exercise of such discretion has been improperly motivated by the desire to discourage or penalize the assertion of procedural rights, action clearly outside the proper scope of prosecutorial discretion.

Indeed, several circuits have recognized the diminished discretion afforded the prosecution when it attempts the substitution of more serious criminal charges. *See, e.g., United States* v. *Andrews, supra,* 633 F.2d at 454; *Lovett* v. *Butterworth,* 610 F.2d 1002, 1007 (1st Cir. 1979), *cert. denied,* 100 S.Ct. 3038 (1980); *Jackson* v. *Walker,* 585 F.2d 139, 145-6 (5th Cir. 1978). In resolving issues of prosecutorial vindictiveness, these courts have espoused a balancing approach which weighs the defendant's interest in freedom from retaliation for the exercise of procedural rights against the prosecution's interest in the exercise of its discretion. The crucial distinction between the addition of charges as contrasted with the substitution of charges, which is based on the premise that the prosecution has

not previously exercised its discretion as to the subsequently added charges, often controls this balancing process.[10]

Accordingly, these courts have sanctioned the addition of more serious charges, thus deferring to the prosecutorial interest in the unhampered exercise of its authority to institute charges based on different and distinct criminal activity. *See, e.g., Hardwick* v. *Doolittle, supra; Jackson* v. *Walker, supra.* These courts also recognize that the substitution of charges, that is, the institution of more serious charges based on the identical conduct underlying the original charges, does not invoke this broad policy of prosecutorial discretion. *See, e.g. Lovett* v. *Butterworth, supra; Miracle* v. *Estelle,* 592 F.2d 1269 (5th Cir. 1979). The interest in the unfettered exercise of prosecutorial discretion having been satisfied by the prosecutor's original charging decision, the further action of substituting more serious charges is naturally and appropriately suspect:

> Absent an explanation encompassing factors unknown or non-existent at the time the original decision was made it could fairly be assumed that the sole factor intervening between such decision and a shift to a more punitive position — the defendant's exercise of a protected right — played a part in the determination. Hence, a reasonable apprehension of the realistic likelihood of vindictiveness might arise.

United States v. *Andrews,* 612 F.2d 235, 246 (6th Cir. 1979). *See also, United States* v. *Andrews, supra,* 633 F.2d at 454.

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[10] This addition/substitution distinction which is often relied upon by the courts in resolving issues of prosecutorial vindictiveness is based on the faulty premise that the decision to not prosecute for particular criminal conduct is not an exercise of prosecutorial discretion. To the contrary, such inaction is often a very appropriate exercise of prosecutorial discretion. That this basic distinction is flawed, however, does not detract from the proposition that the substitution of charges implicates a lesser interest in the exercise of prosecutorial discretion.

C. The Realistic Likelihood Of Vindictiveness Is Not Obviated Merely Because The Challenged Action Occurred During The Pre-Trial Stage Of The Criminal Proceeding.

The petitioner urges that "[i]n the pre-trial stage of a criminal prosecution, . . . the special prophylactic rules fashioned in *Pearce* and *Perry* have no legitimate application . . ." Pet. Brief at 14. Such a position is unprecedented in federal case law and reflects a simplistic and illogical approach to resolving issues of prosecutorial vindictiveness.

As emphasized above, the central issue to be resolved is whether the circumstances under review pose a realistic likelihood of vindictiveness. Where such a likelihood exists, due process of law requires application of a rule analogous to that fashioned in *Pearce*. Relevant to this inquiry are several factors including the nature of the right asserted by the defendant, the prosecutor's knowledge, the nature and timing of the response by the prosecutor, his incentive to discourage the assertion of the defendant's rights, and the institutional interests that may be relevant. Certainly, these factors may be different in nature, and accorded greater or lesser consideration in an assessment of potential vindictiveness, depending upon the procedural context in which the issue has arisen. However, while the stage of the criminal proceeding is thus indirectly relevant, the pre-trial/post-trial distinction is not *per se* determinative of the issue, as erroneously suggested by the petitioner.

Although *Pearce* and *Perry* deal with post-conviction rights and retaliatory responses to their assertion, nothing in those opinions explicitly confines their due process considerations to the post-trial setting. Indeed, the *Pearce* due process rationale has been adopted in a pre-trial context in numerous cases, which at least implicitly acknowledges the propriety of such application. *See, e.g.,United States* v. *Currie*, 653 F.2d 1300 (9th Cir. 1981) (court of appeals held that superseding indictment was a vindictive response to defendant's decision to stand

trial); *United States* v. *Hollywood Motorcar Co.*, 646 F.2d 384 (9th Cir. 1981), petition for cert. pending, No. 81-1144 (filed Dec. 17, 1981) (court upheld claim that a superseding indictment was a vindictive response to a motion to change venue); *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976) (appellate court held that superseding indictment was a vindictive response to demand to be tried before a district judge); *United States* v. *Velsicol Chemical Corp.*, 498 F.Supp. 1255 (D.C. Cir. 1980) (district court held that new charges were a vindictive response to the defendant's *nolo contendere* plea). In those cases holding invalid claims of vindictive prosecution arising in the pre-trial setting, the pre-trial/post-trial distinction was not the fatal variable. Rather, it was the absence of the realistic likelihood of vindictiveness which undermined the charge of prosecutorial misconduct. *See, e.g. United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980) (appellate court rejected claim that federal charge was vindictive response to suppression motion in state court); *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980) (court denied claim that superseding indictment was a vindictive response to motion to dismiss first indictment); *United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977) (court rejected claim that new charges were a vindictive response to defendant's assertion of right to district court jury trial since defendant was not subjected to more severe charges).

The petitioner's flat rejection of any application of the *Pearce/Perry* rule to a pre-trial context is based solely on the dissenting opinion in the *en banc* decision in *United States* v. *Andrews, supra*, 633 F.2d 449. [11] Judge Merritt employed the somewhat anomalous reasoning that the due process rationale developed in *Pearce* was designed solely to satisfy double jeopardy interests which had been unfulfilled due to this Court's

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[11] Petitioner also relies on the decision of the New Mexico Supreme Court in *State* v. *Stevens*, 96 N.M. 627, 633 P.2d 1225 (1981), which heavily relies on the *Andrews* dissent.

holding that the double jeopardy provision did not bar a harsher sentence upon reconviction. *id.* at 458-59. Based on this patently illogical premise, Judge Merritt concluded that the prophylactic rules of *Pearce* and *Perry* do not apply to pre-trial stage where double jeopardy values are not implicated.

Judge Merritt's analysis is simply ill-conceived given this Court's unequivocal rejection of a double jeopardy proscription in the *Pearce* context. *North Carolina* v. *Pearce, supra,* 395 U.S. at 723. Moreover, this analysis ignores the due process rationale underpinning *Pearce* and *Perry* which requires an application of the prophylactic measure only where there exists a realistic likelihood of vindictiveness. This concept is the essence of the *Pearce* ruling and Judge Merritt's failure to acknowledge this controlling idea manifests the basic fallacy of his position and that adopted by the petitioner.

The majority in *Andrews* recognized this proper inquiry, and rejected any absolute pre-trial/post-trial distinction:

> [W]e cannot accept the Government's argument that the prosecutorial stake in a pre-trial setting is always so *de minimis* that there can never be a "realistic likelihood of vindictiveness" in a pre-trial setting. Each situation will necessarily turn on its own facts.

id. at 454.

Analytically, therefore, there is no basis whatsoever for confining the *Pearce/Perry* principle to the post-trial stage of a criminal proceeding. Nevertheless, petitioner urges this Court to hold that the adversarial nature of the pre-trial stage of a criminal case precludes application of the *Pearce/Perry* prophylaxis since such a context does not afford sufficient "opportunities for vindictiveness". Pet. Brief at 30. To the contrary, it is precisely the volatile nature of the pre-trial stage which offers substantial opportunities for retaliatory conduct by a prosecutor. Indeed, the need for a prophylactic measure that confines prosecutorial action to the bounds of due process is

most acute at this stage, a stage where an improperly motivated prosecutor can take great advantage of the adversarial process. To reject any application of the *Pearce/Perry* rule to the pre-trial stage is to ignore this clear potential for an abuse of prosecutorial power:

> While it is true that a prosecutor always has a considerable stake in avoiding the cost and inconvenience of a trial, a prosecutor often has a similar motivation to deter the exercise of Constitutional or statutory rights where something other than a full retrial is involved. To the extent that the exercise of a right in some way decreases the likelihood of conviction or makes a prosecutor's job more burdensome, the prosecutor has an incentive to deter the exercise of that right.

United States v. *Andrews, supra,* 612 F.2d at 248 (Keith, C.J., dissenting).

The analysis of the applicability of *Pearce* and *Perry* to the pre-trial stage reveals the basic policy considerations underlying issues of prosecutor vindictiveness. This Court responded to claims of prosecurtorial vindictiveness by fashioning a prophylactic measure that accommodated the well-settled policy of broad prosecutorial discretion with the due process constraint that defendants be free from retaliation on the part of the government for the exercise of their rights, or the apprehension thereof. The rule was designed to afford that due process protection only in those limited contexts presenting a genuine risk of vindictiveness, and to allow the opportunity to justify the apparent impropriety. Petitioner's expressed concerns that application of this doctrine in the pre-trial setting will unduly burden the criminal justice system, particularly the exercise of prosecutorial discretion, are unfounded.

The due process protection versus prosecutorial discretion balance established in *Pearce* and *Perry* is appropriately applied in the pre-trial setting. To be sure, not every confrontation between the defense and prosecution, an admittedly frequent

occurrence at the pre-trial stage, will warrant application of this doctrine. Consistent with this Court's analysis, however, a presumption of retaliation will arise when there exists a reasonable likelihood of vindictiveness. This prophylactic measure does not unduly burden or interfere with the proper exercise of prosecutorial discretion. Only rarely will the prosecutor's response to a defendant's routine exercise of procedural rights at the pre-trial stage engender the likelihood of vindictiveness. In that event, due process requires appropriate limitation. Moreover, contrary to the petitioner's repeated assertions, a prosecutor is not unreasonably bound to its initial charging decision where changed circumstances support and legitimize further prosecution. See argument, *infra* at 34, n.15. [12] Such objective and explicit justification for further charges was specifically contemplated by this Court in *Pearce* and *Perry*.

The petitioner asserts that the inevitable effect of applying the prophylactic measure in the pre-trial context is that prosecutors will bring the most severe charges possible at the outset of the case. It is difficult to understand the burden posed by such a procedure given its endorsement as a sound prosecutorial policy in the recently promulgated *Principles of Federal Prosecution*. It is stated therein that "the attorney for the government should charge . . . the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." Part C. 1, *Principles of Federal Prosecution*, United States Department of Justice, July, 1980. In any event, proper prosecutorial procedure, not overindictment, is the indicated response to the permissible burdens imposed by the Due Process Clause. In the instant case, the failure to

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[12] At several points in its brief, petitioner notes that the prosecutor often engages in pre-trial investigation during which he receives new information about the accused. Pet. Brief at 21, 30, 44. Any misgivings held by the petitioner that, in such event, additional charges would be precluded, are baseless. Such charges would clearly be appropriate under *Perry*.

originally charge the respondent with the most serious crimes possible was the result of improper prosecutorial procedure. There existed both the opportunity to review the case against the respondent as it had been initiated, as well as the opportunity to reassess the propriety of the current charges. In light of the prosecution's apparent willingness to proceed to trial before the magistrate, the prohibition against prosecuting the respondent on greater charges is a direct result of an exceedingly poor performance of the prosecutorial function.

Finally, it is no answer to suggest that the application of the *Pearce/Perry* doctrine in a pre-trial context is too difficult. Certainly, the assessment of a reasonable likelihood of vindictiveness is not susceptible to bright line analysis, and necessarily rests on the totality of the circumstances in each case. However, the mere difficulty of its application does not justify the abandonment of a prophylactic rule which implements fundamental due process considerations.

D. Prosecutorial Vindictiveness Has Been Condoned Only In The Narrow Context Of Plea Bargaining.

In *Bordenkircher* v. *Hayes, supra,* the defendant was initially charged with forgery. In the course of plea negotiations, the prosecutor explicitly threatened the defendant with prosecution as a habitual offender, a charge carrying a mandatory life sentence, if the defendant refused to enter a guilty plea on the forgery charge. When the defendant persisted in pleading not guilty, the prosecutor brought the more serious charge upon which the defendant was ultimately convicted. Although actual vindictiveness was clear on the record in *Bordenkircher,* this Court held that such retaliatory action by the prosecutor did not violate due process of law.

The petitioner's reliance on *Bordenkircher* is misplaced, erroneously attributing to its holding a breadth expressly disclaimed by the opinion itself. Indeed, the petitioner's unduly

restrictive interpretation of *Pearce* and *Perry* stands in stark contrast to its expansive interpretation of this Court's holding in *Bordenkircher*. There, this Court addressed the narrow question whether due process of law is offended when a prosecutor, during plea negotiations, threatens an accused with more serious charges if he does not plead guilty to the original charge, and subsequently carries out that threat. Analogizing that situation to one where the accused was originally indicted to the fullest extent possible and the prosecutor offered to drop the most serious charge as part of a plea agreement, this Court's opinion is a strong affirmation of the legitimacy and necessity of plea bargaining.

This Court recognized that a threat of more severe punishment which necessarily attends plea negotiations deters the assertion of the defendant's rights. However, this Court characterized these punitive aspects inherent in plea bargaining as inevitable and permissible "attributes of any legitimate system which tolerates and encourages the negotiation of pleas," *id.*, quoting *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 31, and further stated that "this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." *ibid.* Once established, this principle validates prosecutorial action designed to induce a guilty plea. This Court concluded:

> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause.

Bordenkircher v. *Hayes*, 434 U.S. at 365.

In so holding, this Court acknowledged the authority of *Pearce* and *Perry* which proscribes "the State's unilateral im-

position of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction," *id.* at 362, but described that situation as "very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power." *ibid.* quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.). While reaffirming the notion that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional,' " *id.* at 363, this Court concluded:

> But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

ibid. Thus, *Bordenkircher* is simply "a unique case where a prosecutor acted vindictively, but an independent factor — the defendant's ability to chose — eliminated any due process problems." *United States* v. *Andrews*, 633 F.2d at 457.

Bordenkircher neither undermines nor modifies the *Pearce/Perry* rationale if its holding is recognized, as it must, to be firmly grounded upon this Court's express determination that plea bargaining is an essential and legitimate component of the administration of the criminal justice system. Rather, "their [*Pearce* and *Perry*] basic legitimacy is affirmed even though the Court holds that they are misapplied in the context of plea bargaining." Note, *Prosecutorial Vindictiveness and Plea Bargaining: What are the Limits? — Bordenkircher* v. *Hayes*, 27 DePaul L.Rev. 1241, 1255 (1978). This analysis unquestionably distinguishes *Bordenkircher* from the Court's rulings in *Pearce* and *Perry*, and precludes its applicaton to the present matter. Moreover, in *Bordenkircher*, Mr. Justice Stewart's

delineation of the precise issue before the Court was clear and unambiguous:

> The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.
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> * * *
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> It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. *This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty.*

id. at 358, 360 (emphasis supplied) (footnoted deleted).

The factual setting unequivocally excepted from the holding in *Bordenkircher* is now before this Court. On May 24, 1979, the respondent was returned to the magistrate's court in Hyattsville for trial on the petty offense and misdemeanor charges pending against him. Prior to his appearance, his counsel approached the prosecuting attorney and inquired about the possibility of a plea agreement. She expressed some interest; however, any communication reasonably characterized as plea negotiations was abruptly terminated by the respondent who informed his attorney of his desire for a jury trial. During the brief discussion among the parties, there was no reference whatsoever made to the possibility that the respondent could face additional and more serious charges if he elected a jury trial. (J.A. 26).

Thus, it is clear that the petitioner's reliance upon *Bordenkircher* is misplaced. Indeed, this Court expressly declined to apply its holding in *Bordenkircher* to the present facts. That decision, which carefully resolves any apparent conflict with *Pearce* and *Perry*, employs a rationale manifestly inapplicable to the present case where there was none of the "give-and-take" of plea bargaining and the respondent had absolutely no notice of the possibility that more serious charges would be instituted upon his election of a jury trial.

The absence of any meaningful plea negotiations in the instant case also undermines the petitioner's reliance upon this Court's decision in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978). There, this Court found no impermissible element of punishment within a statutory scheme which authorized more lenient sentences for defendants who pled *non vult* in homicide cases. Under the New Jersey homicide statute, a sentence of life imprisonment is mandatory for defendants convicted by a jury of first-degree murder. Although court trials or guilty pleas are precluded by statute, a plea of *non vult* is allowed which, if accepted by the court, authorized up to life imprisonment but does not require it. Relying upon *United States* v. *Jackson*, 390 U.S. 570 (1968),[13] the defendant contended that because one who declines to stand trial can receive a lesser term, the mandatory life sentence he received upon conviction unconstitutionally burdened his right to a jury trial.

This Court rejected the defendant's argument. Emphasizing "that not every burden on the exercise of a constitutional right,

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[13] In *Jackson*, this Court held that the death sentence provided by the Federal Kidnapping Act was invalid because it could be imposed only upon those defendants insisting on a jury trial, whereas the maximum penalty for those convicted after a court trial or upon a guilty plea was life imprisonment. This Court concluded that this statute created an unconstitutional condition that needlessly punished the right to plead not guilty and to demand a jury trial.

and not every pressure or encouragement to waive such a right, is invalid," *id.* at 218, this Court reaffirmed the legitimacy of plea bargaining despite its imposition of difficult choices upon defendants. The fact that the defendant sacrificed any possibility of leniency if he went to trial was compared to the situation in *Bordenkircher* where the defendant's desire to go to trial resulted in a more serious charge. As in *Bordenkircher*, this Court found no impermissible element of retaliation or vindictiveness " 'so long as the accused [was] free to accept or reject the choice presented to him by the State," id. at 225, quoting *Bordenkircher* v. *Hayes*, 434 U.S. at 360, stating:

> There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed.

id. at 223-24.

The facts of the present case simply do not permit this fundamental reliance upon the legitimacy of plea bargaining that characterizes this Court's decisions in *Bordenkircher* and *Corbitt*. The petitioner's position that these decisions control the present case represents an unwarranted extension of their narrow holdings, and was expressly disavowed by this Court in *Bordenkircher*. This case does not present the proper use by the prosecutor of available leverage in the plea bargaining process or the legitimate imposition of difficult choices upon a defendant. Rather, the action taken against the respondent in this case was the constitutionally impermissible exercise of the government's power to initiate prosecution as proscribed by *Blackledge* v. *Perry*.

II. APPLICATION OF THE *PEARCE/PERRY* PROPHYLACTIC RULE TO THIS CASE REVEALS A FUNDAMENTAL VIOLATION OF DUE PROCESS OF LAW BECAUSE THE PROSECUTOR'S SUBSTITUTION OF CHARGES AFTER THE RESPONDENT HAD EXERCISED HIS RIGHT TO A JURY TRIAL WAS NOT JUSTIFIED BY ANY INTERVENING CONDUCT OR CIRCUMSTANCES.

Pearce and *Perry* manifestly support the court of appeals' finding that the reasons proffered by the prosecutor in justification of the increased charges failed to dispel the realistic likelihood of vindictiveness presented in this case.

A. The *Pearce/Perry* Rule Requires That The Initiation Of More Serious Charges Be Justified By Identifiable Conduct On The Part Of The Respondent Occurring Subsequent To The Exercise Of His Right To A Jury Trial.

In *Pearce*, this Court directed that the imposition of a more severe sentence after a new trial must be justified by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. Although undoubtedly mindful of the distinct possibility that information concerning the defendant's conduct prior to the first sentencing may not surface until subsequent to that proceeding, *Pearce* expressly held that such information cannot supply the basis for an enhanced sentence. [14]

The precision with which this Court in *Pearce* fashioned its standard reflects its concern that even the appearance of vindic-

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[14] This Court's language permits no other conclusion, as implicitly acknowledged by Mr. Justice White's concurrence wherein he disagreed with the majority's limitation, but stated his approval of "an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *North Carolina v. Pearce*, 395 U.S. 751.

Also of relevance here is this Court's comments which endorse "[t]he freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence . . ." *id.* at 723.

tiveness be minimized. Where the harsher sentence follows only the assertion of appellate rights, an element of vindictiveness, and certainly its appearance, is much more likely to be perceived. In other words, if the sole additional factor known to the sentencing judge upon reconviction is the exercise of a procedural right, it is hardly unreasonable to infer that that exercise prompted the increased punishment. Therefore, prohibiting enhanced sentences upon reconviction in all but those cases where such a sentence is warranted by conduct subsequent to the initial imposition of sentence significantly reduces the chance that the increased punishment was a result of retaliation, or even afforded such an appearance.

In holding that "it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*," *Blackledge* v. *Perry*, *supra*, 417 U.S. at 28-29, this Court adopted and applied to the issue of prosecutorial vindictiveness the prophylactic rule fashioned in *Pearce*. Although not explicitly incorporating the aspect of the *Pearce* holding which stated the possible justification for an enhanced sentence, the *Perry* court nevertheless made apparent its total affirmance of this principle.

This Court specifically stated that the indictment obtained by the prosecutor after the filing of the notice of appeal was based on the identical conduct for which Perry had been prosecuted in the lower court. Thus, the substitution of charges followed only the exercise of his right to a trial *de novo*, and was not the result of newly discovered evidence or new information otherwise pertaining to the prosecutorial charging decision. Absent such intervening justification, this Court perceived "opportunities for vindictiveness" which warranted the application of the *Pearce* due process rule. This Court qualified its holding, however, as it had in *Pearce*, by stating that "this would clearly be a different case if the State had shown it was impossible to

proceed on the more serious charge at the outset. . . ." *id.* at 29. Thus, this Court acknowledges the propriety of increased charges only if justified by circumstances arising subsequent to the decision to proceed on the original charges. [15]

Numerous courts have had little difficulty in applying the *Pearce/Perry* prophylactic measure, as qualified by the aforementioned caveat. Those cases have upheld the claims of prosecutorial vindictiveness emphasizing, indeed, relying upon, the fact that at the time of the original charge, the prosecutor was aware of the basic facts or events supporting the subsequent, more serious, charges. For example, in *United States* v. *Ruesga-Martinez, supra,* the defendant had been arraigned before a magistrate on a misdemeanor charge of unlawful entry, in violation of 8 U.S.C. § 1325. Subsequent to his refusal to consent to be tried by the magistrate, the defendant was charged in a two-count indictment with felony violations of 8 U.S.C. §§ 1325, 1326. Finding that the increase in the severity of the charges created a sufficient appearance of vindictiveness to call into play the holdings of *Pearce* and *Perry,* the court sought a legitimate basis for such action. It found none, stating:

> The prosecution attempts to justify its conduct by emphasizing that there was more than ample evidence that appellant was a multiple offender. This does not in itself justify an increase in the severity of the charges in the second proceeding because that evidence was known to the prosecution before it brought the original lesser charge. . . . In the present case, the only new facts alleged in the felony indictment were appellant's previous arrests, conviction, and deportation. There can be no doubt that such facts

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[15] Increased charges are justifiable under several circumstances, such as the receipt of additional information through ongoing investigation, *see, e.g., United States* v. *Griffin,* 617 F.2d 1342, 1348 (9th Cir. 1980); *United States* v. *Jamison,* 505 F.2d 407, 417 (D.C. Cir. 1974), and previous legal impossibility, *Blackledge* v. *Perry, supra,* 417 U.S. at 29, n.7.

> were known to the prosecution before it initiated the original complaint.

id. at 1370. The court upheld the appellant's claim of prosecutorial vindictiveness. *See also United States* v. *Alvarado-Sandoval*, 557 F.2d 645, 646 (9th Cir. 1977).

Similarly, in *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976), the Fourth Circuit held that the defendant's prosecution on increased charges subsequent to his appeal of a previous conviction denied him due process of law. In applying the *Perry* rationale, the court noted that the prosecution was ready to proceed to trial on the original indictment and that it was aware of all of the facts essential for the increased charges prior to the defendant's assertion of his appellate rights. Further, no new evidence was discovered between the original conviction and the new charges which could justify the increase. Other courts have recognized the critical importance of this factor and upheld the claims of prosecutorial vindictiveness. *See, e.g., Miracle* v. *Estelle*, 592 F.2d 1269, 1276 (5th Cir. 1979); *United States* v. *DeMarco*, 550 F.2d 1224, 1226 (9th Cir. 1977); *United States* v. *Jamison*, 505 F.2d 407, 416-17 (D.C. Cir. 1974).

However, other courts — in disregard of the need for explicit justification for increased charges — have suggested that claims of inadvertence, *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977), inexperience, *United States* v. *Andrews*, *supra*, 633 F.2d at 456, or a different approach by a successor prosecutor, *United States* v. *Ricard*, 563 F.2d 45, 48 (2d Cir. 1977), are sufficient to rebut a charge of vindictiveness. Given this Court's articulated concern that defendants be free of the apprehension of vindictive motivation on the part of the prosecution, such an approach is grossly inappropriate.

Pearce and *Perry* expressly repudiated any requirement that actual vindictiveness be demonstrated, finding that "[t]he existence of a retaliatory motivation would be extremely difficult to

prove in any individual case." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 725, n.20. Recognizing the problems that would permeate a process whereby the actual motives and subjective intent of a court or prosecutor are scrutinized, this Court reasoned that the most effective means of policing vindictive action is to proscribe, with limited exceptions, those situations giving rise to a realistic likelihood of vindictiveness. As stated by the court of appeals in this case:

> [*Perry*] adopts a prophylactic rule designed to spare courts the unseemly task of probing the actual motives of the prosecutor in cases where objective circumstances suggest a realistic possibility of vindictiveness.

Pet. App. 9a. A willingness to accept prosecutorial excuses of inadvertence or mistake, or other subjective good faith assertions, in rebuttal of a realistic likelihood of vindictiveness is directly opposed to the policy considerations that give substance to the *Pearce*/*Perry* due process measure, and vitiates its prophylactic impact.

The rule propounded by this Court in *Pearce* and *Perry* represents the accommodation of legitimate but competing interests in the free exercise of prosecutorial discretion and the due process right of an accused to pursue procedural rights without fear of retaliation. While such a rule necessarily limits prosecutorial discretion to some degree, the restraint is narrowly confined to do no more than is required by due process, that is, to assure an absence of vindictiveness or an appearance thereof. *Perry* clearly recognizes that "enhanced charges are frequently required because the prosecutor received new information about the accused during the course of trial preparation," Pet. Brief at 44, and, contrary to the petitioner's assertion, does not restrict a prosecutor from acting upon that information. See *supra* at 25. The rule does not otherwise deny the opportunity to justify increased charges, but only requires a justification that satisfies its underlying purpose. Thus, while preserving the due process interest in freedom from retaliation

for the exercise of a procedural right, the prophylactic rule applicable in this case is nevertheless "sufficiently flexible to accommodate the legitimate needs of the prosecutor in exercising charging discretion." Pet. Brief at 44.

B. The Prosecutor's Explanation Is Founded On Information Well Known To The Government Prior To The Respondent's Exercise Of His Right To A Jury Trial, And Is Insufficient To Rebut The Realistic Likelihood of Vindictiveness Present In This Case.

The Petitioner argues that the prosecutor sustained his burden of rebuttal in this case by his "investigation of respondent during pretrial preparation, which occurred after the case was transferred to him from another prosecuting attorney." Pet. Brief at 46. The position fundamentally misconceives the nature of the justification that must be advanced by the prosecutor pursuant to *Pearce* and *Perry*. See discussion *supra* at 32-37. Moreover, petitioner glibly ignores the simple, but crucial, fact that all the grounds it relies upon in attempting to justify the increased charges in this case were known to the prosecution prior to the respondent's request for a jury trial on May 24, 1979:

First, the prosecuting attorney had the opportunity, prior to appearing in court in this matter, to read the incident report filed by Officer Morrissette and to speak with this officer about the offenses. Thus, the prosecution was well aware of the facts underlying the charge and the seriousness of the crime. (J.A. 25-26).

Second, the prosecution was aware of the respondent's history of violent crime through Officer Morrissette who, months earlier in February, 1979, had attended the respondent's state trial on charges of possession of heroin with the intent to distribute and the attempted unlawful shooting of a police officer. (Pet.App. 29a). In addition, the magistrate's court file contained a copy of the respondent's F.B.I. record which reflected his lengthy history of violent crime. (J.A. 6).

Third, the prosecution was then aware of information which directly supported an inference that the respondent's illegal conduct on February 2, 1976, was related to narcotics trafficking. Subsequent to February 2, 1976, Officer Morrissette had contacted various law enforcement authorities and learned that the respondent was thought to be a major heroin dealer, and was associated with individuals who smuggled heroin into the United States utilizing airfields in Florida, Georgia and Maryland. (Pet.App. 28a). The prosecution's knowledge of the respondent's conviction for heroin trafficking in Virginia is also relevant in this regard. (Pet.App. 29a).

Fourth, any basis for the allegation that the respondent had committed perjury at the preliminary hearing on March 30, 1976, was established and well known to Officer Morrissette and, therefore, to government counsel, substantially prior to May 24, 1979.

Fifth, the prosecution was obviously aware of the respondent's failure to appear for trial scheduled for April 29, 1976, given the protracted delay in the proceedings, as well as the pendency of that charge.

It is readily apparent that the increased charges in the present case did not rest on changed circumstances or newly discovered evidence arising subsequent to the prosecution's decision to proceed to trial on the lesser charges and the respondent's election of a jury trial. On the contrary, the proffered justification is based solely on information already in the possession of the government at the time of the respondent's appearance before the magistrate. It bears emphasizing that Officer Morrissette, from whom prosecutor Norton obtained the substantial portion of his information, was also the source of information for prosecutor Bruce and had conducted his investigation months prior to the May 24, 1979, trial date. Indeed, even the United States Attorney's Office in Baltimore had a prior awareness of the respondent's case, including information pertaining

to the nature of the pending charges and the crimes for which he was convicted in Virginia state court. (Pet.App. 25a-27a).

Thus, despite knowledge of the seriousness of the alleged offenses; of the respondent's history of violent crime and involvement in narcotics trafficking; of his possible perjury before the magistrate; and his failure to appear for trial, the prosecution on May 24, 1979, was content to proceed against the respondent on the pending petty offense and misdemeanor charges, and would have done so but for his exercise of his constitutional right to a jury trial.

Contending that the events in this case are not suggestive of vindictiveness, the petitioner emphasizes the inability of either Officer Morrissette or Ms. Bruce to obtain a felony indictment. (Pet. Brief at 42). This argument, which merely states the obvious, is specious. The prosecution of the respondent was assigned to Ms. Bruce who, as a representative of the United States Attorney's Office, could readily enlist the aid of that office. Neither the record in this case nor common sense suggests that the prosecutor was absolutely required to proceed to trial immediately upon the respondent's return to the District of Maryland, as opposed to calling the case merely for an initial appearance, seeking a brief continuance or otherwise holding the matter in abeyance. There existed ample opportunity prior to trial to reassess the propriety of proceeding against the respondent on the original charges, and only a brief phone call was needed to obtain further advice on the matter.

The petitioner asserts that a failure to reindict the respondent would have been "a dereliction of duty" under the circumstances of this case. (Pet. Brief at 48). Rather, it was the magistrate court prosecutor's failure to take appropriate action in response to the situation presented to her that was grossly inadequate. However, the prosecution once having decided to proceed to trial on the pending charges, its legitimate interest in the free exercise of its charging authority did not permit repeat-

ed determinations to institute charges without regbard to the respondent's due process rights.

The petitioner dismisses the possibility of vindictiveness on the basis that the increased charges were a proper result of a reevaluation of the case which had been brought by a law enforcement officer. (Pet. Brief at 42). While it is clear that the original charges in this case were brought by Officer Morrissette by criminal complaint, the prosecutor's ability to review, reconsider or reject those charges was intact. The role of the magistrate court prosecutor can only be assumed to include a proper review of the evidence and of the charges set by an officer. If prosecutorial decisions are, in reality, finalized by law enforcement officers, it will be the result of an abdication of the prosecutorial function by those assigned to carry it out. If the government chooses to administer magistrate court prosecutions in such a way as to entrust the final charging decision to such officers and/or part-time, specially assigned "prosecutors," it assumes the risk of whatever ill-advised action its representative may take. The appropriate response to such a situation is the proper administration of the prosecutorial function at the magistrate's level, not the sacrifice of the essential due process protection against the actuality or apprehension of vindictiveness.

The case under review presents unique circumstances where, subsequent to his exercise of his constitutional right to a jury trial, the respondent was subjected to increased charges based upon information known to the prosecution prior to the invocation of his rights. Although possessing the facts which ultimately supported the more serious charges, the prosecution was content to proceed to trial on the original petty offense and misdemeanor charges, and indicted the respondent only after his election of a jury trial and in the absence of any intervening justification. Given the realistic likelihood of vindictiveness attending these events, an application of the *Pearce/Perry* due process rationale is warranted.

As in *Perry*, the record in this case does not disclose actual vindictiveness, and none is claimed by the respondent. However, the relevance of the *Pearce/Perry* prophylaxis is not conditioned upon a finding of actual retaliation, but is required where a realistic likelihood of vindictiveness exists. The petitioner's repeated emphasis of the absence of actual vindictiveness, *see* Pet. Brief, Argument II.B., does not justify a distortion of the due process analysis established by this Court and of the fundamental purpose of this prophylactic measure.

Appropriately limited to the peculiar facts under review, this Court's adoption of the *Pearce/Perry* rule in this case will not promote an unwarranted interference with the proper exercise of prosecutorial discretion. Rather, it will recognize the necessity for maintaining judicial vigilance over the prosecutorial function to the extent required by due process of law.

CONCLUSION

The judgment of the court of appeals should be affirmed. [16]

Respectfully submitted,

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[16] Because of its conclusion that the Due Process Clause prohibits the respondent's conviction on the felony charge and that that conviction must be reversed, the court of appeals below did not consider the respondent's contention that the evidence was legally insufficient to convict him of that charge. Therefore, should this Court reverse the judgment of the court of appeals, this matter should be remanded for consideration of this remaining issue.